90-1130

No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WALTER R. KELLY, Superintendent,
Attica Correctional Facility,

Petitioner,

—against—

ELMER HARPER, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Second Circuit abused the function of a federal court on collateral review of a state court judgment of conviction pursuant to 28 U.S.C. § 2254 and issued a ruling in conflict with the decisions of this Court and of the other circuit courts when it nullified the judgment of conviction by determining that the trial court's exercise of discretion to sustain objections to questions posed by defense counsel in regard to the victim's mental and emotional state, by itself alone, caused respondent to be in custody in violation of the Constitution.

2. Whether this Court should exercise its supervisory power to review the Second Circuit's violation of Rule 52(a) of the Federal Rules of Civil Procedure, where that court made its own credibility assessment and improperly refused to accept the District Court's factual findings that had resulted in the conclusion that the trial court's conduct was, at most, harmless error.

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ruling in conflict with the decisions of this Court and of the other circuit courts when it nullified the judgment of conviction by determining that the trial court's exercise of discretion to sustain objections to questions in regard to the mental and emotional state of the victim posed by defense counsel, by itself alone, caused respondent to be in custody in violation of the Constitution; second, the court violated Rule 52(a) of the Federal Rules of Civil Procedure by making its own credibility assessment and improperly refusing to accept the District Court's factual findings that had resulted in the conclusion that the trial court's conduct constituted, at most, harmless error.. 9

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IN THE

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OCTOBER TERM, 1990

No. _____

WALTER R. KELLY, Superintendent,
Attica Correctional Facility,

Petitioner,

—against—

ELMER HARPER, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on October 10, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals, *Harper v. Kelly*, 916 F.2d 54 (2d Cir. 1990), is appended hereto as Appendix A. The opinion of the District Court for the Southern District of New York, *Harper v. Kelly*, 704 F. Supp. 375 (S.D.N.Y. 1989) (Sweet, D.J.), is appended hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on October 10, 1990. The petition for certiorari is filed within ninety days of the date of the judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 2254(a) provides:

"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Rule 52(a) of the Federal Rules of Civil Procedure provides, in pertinent part:

"Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

STATEMENT OF THE CASE

The Facts

On May 9, 1984, at approximately 8:00 p.m., *Frank Lester*, a security supervisor at Sears Roebuck and Co. in The Bronx accompanied *Jack Small*, an assistant manager, in taking the cash receipts from the Sears Auto Center to the main building across the street for night deposit (Small: T. 23-25; 43; Lester: T. 75-77, 83).[1] Mr. Small had placed approximately $4,000 in cash into a bag that he secured in the right pocket of his hunting vest (Small: T. 26, 28-29, 43-44; Lester: T. 77). As the two men were walking side by side, respondent emerged from behind a parked van and acted as though he were drunk (Small: T. 28, 29, 41, 46; Lester: T. 78). He was wearing a black rain hat pulled close to his forehead, sunglasses, a 3/4 length black jacket, black trousers, and dark shoes (Small: T. 30, 36-37, 40; Lester: T. 79-80, 85-87). Respondent then bumped into Mr. Small's right side and said, "Give me your vest" (Small: T. 28, 30, 47; Lester: T. 78). Mr. Lester stood at the left side of Mr. Small and told him not to give the vest to respondent (Small: T. 28, 30, 41-42; Lester: T. 78, 85).

When Mr. Small did not comply with respondent's demand, respondent pulled a large revolver from his waistband, put the barrel of the gun at Mr. Small's stomach, and said, "If you don't give me that vest I'll blow your . . . head off" (Small: T. 28, 30; Lester: T. 78-79). Mr. Small then relinquished the vest to respondent (Small: T. 28, 30; Lester: T. 78). Since it was still dusk and the lighting conditions in the parking field were good, and since Mr. Small and Mr. Lester were approximately two feet away from respondent at the time of the robbery, they were able to see that respondent was a dark-skinned black man, who had about

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1 Numerals preceded by "T." refer to the minutes of the trial.

one to two days' growth of beard,[2] and to estimate his height at 5'8" to 5'9" and weight at 120 to 145 lbs. (Small: T. 26-27, 31, 38-40, 50-51, 70-71; Lester: T. 80, 89-92). From the time respondent emerged from behind a van to the completion of the robbery both men had the opportunity to get a good look at respondent for roughly twenty-five to forty seconds (Small: T. 30; Lester: T. 79, 87-88). The police were called and Mr. Small and Mr. Lester provided a description of respondent (Small: T. 34-35, 50-51; Lester: T. 80, 88-92).

On May 29, 1984, respondent was arrested for shoplifting at the Sears store on Fordham Road. This did not result in his apprehension for the previous robbery (Lester: T. 93). Although Mr. Lester was present in the store, he did not recognize respondent, not only because respondent's appearance was different at that time, but also because another security officer had made the arrest. Further, Mr. Lester's attention was directed elsewhere, since in addition to speaking with employees and customers, he was involved in quelling a commotion caused by someone else detained for shoplifting (Lester: T. 95, 102-04, 107-08).

Subsequently, Police Officer *James Sullivan* established that respondent was a suspect in the robbery and took a photo array to the Sears department store (Sullivan: T. 118-19). Thereafter, he arranged for a lineup in which respondent would be the subject (Sullivan: T. 119).

The lineup was conducted on July 31, 1984, at the Bronx District Attorney's Office (Small: T. 31, 52-53; Lester: T. 81, 97-98; Sullivan: T. 119). Mr. Lester and Mr. Small were brought in, one at a time, to view the lineup (Small: T. 31, 52; Lester: T. 80, 99-100; Sullivan: T. 120). Both men selected respondent, who was in position number one, as the perpetrator of the robbery (Small: T. 31; Lester: T. 81, 100).

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2 Small testified that respondent was essentially clean-shaven (Small: T. 38, 64-65); Lester also testified that respondent was clean-shaven but stated that respondent had a small moustache (Lester: T. 92).

The Cross-Examination Regarding Mr. Small's Mental and Emotional State

Q. So, the very first time you had an idea there was going to be any kind of a problem here was when somebody bumps into you and tells you to give him the vest, is that correct?

A. Yes, sir.

Q. How did you feel when those words were said?

[The Prosecutor]: Objection.

The Court: Sustained.

Q. Did you have a reaction when those words were said to you?

[The Prosecutor]: Objection.

The Court: Sustained.

Q. Were you scared?

[The Prosecutor]: Objection.

The Court: Sustained.

Q. Had you ever been the victim of a robbery before?

[The Prosecutor]: Objection.

The Court: Sustained. (T. 46-47)

Defense Counsel's Summation Regarding the Witnesses' Mental and Emotional State

"[I]t was surprise, they told you they were completely surprised by this. You have somebody who has been completely surprised and has no idea this is about to occur, confronted with a horrible situation" (T. 157).

"I'm sure that both Mr. Lester and Mr. Small were very much afraid as any person would be with a gun stuck in your [sic] stomach especially, I'm sure, one that must appear to be twelve feet long" (T. 158-59).

"So, the ability to form the image based on fear, . . . the shortness of the incident, surprise, all the other factors. I don't think there was that kind of ability to create the image of the [robber's] face" (T. 160).

The Judgment of Conviction

On October 4, 1985, respondent was convicted, following a trial by jury, of Robbery in the First Degree [New York Penal Law § 160.15(4)], and was sentenced as a second felony offender to an indeterminate term of imprisonment of from ten to twenty years.

The State Court Appeal

Respondent appealed from the judgment of conviction to the Supreme Court of the State of New York, Appellate Division, First Department; in the appeal, he claimed (1) that the trial court improperly precluded defense counsel from questioning the victim concerning what his emotional state had been when the crime occurred, and (2) that the prosecutor engaged in misconduct on summation. On September 30, 1986, the Appellate Division unanimously affirmed his conviction, without opinion. *People v. Harper*, 123 A.D.2d 528 (1st Dept. 1986).

On November 24, 1986, respondent's application for leave to appeal to the New York Court of Appeals was denied. *People v. Harper*, 68 N.Y.2d 1001 (1986) (Meyer, J.).

The Petition For A Writ Of Habeas Corpus

On February 19, 1988, respondent, *pro se*, filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. He raised the same claims as those in his state appeal.

In his opinion, dated January 4, 1989, District Judge Robert W. Sweet ruled that respondent had exhausted both claims and was not procedurally barred from review but that the claims were without merit. *Harper v. Kelly*, 704 F.Supp. 375 (S.D.N.Y. 1989) (Appendix B). Regarding the issue of

confrontation, Judge Sweet found that the cases cited by respondent to support the position that he had a right to cross-examine a robbery victim concerning his emotional reaction were not applicable to the circumstances presented here since both witnesses for the People had the opportunity to view the robber before the crime occurred and the attendant emotional response began, and since there was corroboration of the robbery victim's identification testimony. *Harper v. Kelly*, 704 F.Supp. at 379 (Appendix B, p. 14a). Judge Sweet concluded that even if respondent's rights had been violated, the violation would be harmless error since respondent's trial counsel had been permitted lengthy cross-examination of the People's witnesses and permitted to argue that the victim's emotional response to being robbed at gunpoint would have been one of fear; further, the trial court in its charge had instructed that the jury must consider the mental and emotional state of the witness. *Harper v. Kelly*, 704 F.Supp. at 379 (Appendix B, p. 15a). As for respondent's second claim, Judge Sweet determined that the prosecutor's comments on summation did not rise to the level of a constitutional violation.[3] *Harper v. Kelly*, 704 F. Supp. at 379 (Appendix B, p. 16a). Accordingly, on January 11, 1989, Judge Sweet denied the petition and granted respondent a certificate of probable cause so that respondent could appeal the denial to the Court of Appeals for the Second Circuit.

The Decision of the Court of Appeals

On appeal, the Second Circuit reversed the dismissal by the District Court and remanded the case with instructions to grant the writ conditionally. The Second Circuit found that the trial court's decision to sustain objections to questions posed by defense counsel on the subject of the victim's mental and emotional state at the time of the incident "infringed upon the defendant's Sixth Amendment right to confront his accusers by disallowing this significant line of inquiry and

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3 No issues concerning the prosecutor's summation were raised on appeal to the Second Circuit.

that the error was not harmless. . . ," *Harper v. Kelly*, 916 F.2d at 55 (Appendix A, p. 2a).

According to the Second Circuit, the testimony of the other eyewitness to the case, Mr. Lester, "could not have carried much weight with the jury because cross-examination revealed that Lester did not identify Harper as the gunman during their extended face-to-face encounter in Sears' security office just three weeks after the robbery. It was not until a police lineup over two months later that Lester finally identified Harper. Accordingly, Small's testimony was the key (and perhaps the only) evidence that the jury considered in convicting Harper." *Harper v. Kelly*, 916 F.2d at 57 (Appendix A, p. 7a). In addition, the Second Circuit found no basis for harmless error even though defense counsel in summation argued to the jury that fear of injury might have distorted the victim's perception and the trial court in its charge to the jury instructed that the mental and emotional state of a witness could be considered in assessing the proof of guilt. *Harper v. Kelly*, 916 F.2d at 57-58 (Appendix A, p. 7a).

REASONS FOR GRANTING THE WRIT

POINT

Review of the Second Circuit's decision in this case is warranted for two reasons: First, the Second Circuit abused the function of a federal court on collateral review of a state court judgment of conviction pursuant to 28 U.S.C. § 2254 and issued a ruling in conflict with the decisions of this Court and of the other circuit courts when it nullified the judgment of conviction by determining that the trial court's exercise of discretion to sustain objections to questions in regard to the mental and emotional state of the victim posed by defense counsel, by itself alone, caused respondent to be in custody in violation of the Constitution; second, the court violated Rule 52(a) of the Federal Rules of Civil Procedure by making its own credibility assessment and improperly refusing to accept the District Court's factual findings that had resulted in the conclusion that the trial court's conduct constituted, at most, harmless error.

This Court should, in the exercise of its supervisory power to review an aberrant ruling by a circuit court, and settle conflicts among the circuits, grant petitioner's request for a writ of certiorari. In reversing the decision of the District Court and granting respondent's petition for a writ of habeas corpus, the Second Circuit abused the function of the federal court on collateral review of a state court judgment of conviction and, in a case of first impression for this Court, unjustifiably expanded the scope of the Confrontation Clause by endeavoring to create a blanket rule that any and all inquiry into a witness's mental and emotional state must be permitted as a constitutional right. The Second Circuit's ruling stands in opposition to every decision of this Court on the subject of the Confrontation Clause and on the extent of federal intervention on collateral review, and similarly is in conflict with the other circuit courts. Further, the Second Circuit, in contravention of Rule 52(a) of the Federal Rules of Civil Procedure, wrongfully disregarded the factual find-

ings of the District Court that had resulted in the conclusion that, at most, the trial court's conduct constituted harmless error.

At the outset, this Court has plainly established that the Confrontation Clause does not prevent a trial judge from imposing reasonable limits on cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *Davis v. Alaska*, 415 U.S. 308, 316 (1974). In addition, citing *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985), this Court in *Van Arsdall* noted that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in any way, and to whatever extent, the defense might wish." *Id. Accord United States v. Owens*, ____ U.S. ____, 108 S.Ct. 838, 842 (1988); *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987). In *Olden v. Kentucky*, ____ U.S. ____, 109 S.Ct. 480 (1988), this Court held that harmless error did not apply to the preclusion of questioning that denied the jury any opportunity to consider that the People's witness had a motive to lie that she had been raped. *Id.* at 483. This Court, however, has totally rejected the claim of an alleged violation of the right of confrontation where, as here, the defendant raised only "gossamer possibilities of prejudice." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.), *quoted in Dutton v. Evans*, 400 U.S. 74, 89-90 (1970). Further, this Court in *Van Arsdall*, 475 U.S. at 681-84, held harmless error analysis can be applied to violations of the Confrontation Clause. *Id.* at 684.

The Second Circuit's ruling conflicts not only with the decisions of this Court but also with those of the circuit courts. Although the Second Circuit attempted to buttress its decision by citing *United States v. Smith*, 563 F.2d 1361 (9th Cir. 1977), the District Court had already properly concluded that the case was inapposite because even though the Ninth Circuit observed in *dicta* that emotional factors are relevant in identification, that court upheld the eyewitness identification, considering it to have been given honestly, without hesitation, and indicated its general willingness to uphold the

jury's verdict: "We still cling to the notion that the testimony of one witness, if solidly believed, is sufficient to prove the identity of a perpetrator of a crime. [Citations omitted.] Where there is some corroboration of that testimony, even greater reason exists for upholding the verdict of a jury which accepted it." *Id.* at 1363; *Harper v. Kelly*, 704 F.Supp. at 379 (Appendix B, p. 14a). Further, an examination of recent decisions of the circuit courts reveals that in a variety of circumstances limitation of cross-examination has not been found violative of the Confrontation Clause, and where such violation has occurred, the error was found harmless.[4]

Moreover, of particular significance to the present case, the Second Circuit ignored this Court's repeated admonition that greater forbearance is required in collateral review of a state court conviction than in review of a direct appeal from a federal district court. In *Greer v. Miller*, 483 U.S. 756 (1987), this Court rejected the claim of a habeas petitioner that a prosecutor's question at trial concerning his post-arrest

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4 *See e.g.*, *United States v. Barrett*, 766 F.2d 609 (1st Cir. 1985) (restriction of cross-examination of accomplice witness did not violate the 6th Amendment); *Carillo v. Perkins*, 723 F.2d 1165 (5th Cir. 1984) (precluding defendant from impeaching witness through cross-examination regarding unadjudicated criminal offenses violated right of confrontation but the error was harmless); *United States v. Grier*, 866 F.2d 908 (7th Cir. 1989) (defendant had no basis to contend that disclosure of information regarding the pen register recovered was necessary for him to vindicate his right of confrontation); *Haywood v. O'Leary*, 827 F.2d 52 (7th Cir. 1987) (trial court's refusal to allow questioning on subject that another assailant identified by the witness had not been arrested and another person he had identified—though prosecuted—was not convicted did not violate the 6th Amendment); *United States ex rel. Blackwell v. Franzen*, 688 F.2d 496 (7th Cir. 1982), *cert. denied*; 460 U.S. 1072 (1983) (trial court's preclusion of defense counsel's questioning whether People's witness had ever recanted his confession did not violate the 6th Amendment); *Clark v. Ricketts*, 886 F.2d 1152 (9th Cir. 1989) (trial court's refusal to permit cross-examination regarding the name and address of the government's John Doe witness did not violate the 6th Amendment); *United States v. DeParias*, 805 F.2d 1447 (11th Cir. 1986) (trial court's limitation of cross-examination regarding inquiry into the terms and conditions of a witness's plea agreement did not violate the 6th Amendment).

silence required reversal. This Court found no *Doyle* violation and concluded that unless there were prosecutorial misconduct that infected the entire trial, there would be no basis to find reversible error. *Id.* at 765-67. Justice Stevens, in the concurring opinion to *Greer*, aptly noted that there is a different standard applicable in habeas corpus and that although he might have found a *Doyle* violation if the case had been presented to him on direct appeal he declined on collateral review to find an impropriety sufficiently egregious to warrant the reversal of the state court conviction. *Id.* at 767-69. If a prosecutor's question concerning a defendant's post-arrest silence did not require reversal, here the trial court's ruling surely should merit judicial restraint on collateral review. *See also Lakeside v. Oregon*, 435 U.S. 333 (1978) (court's instruction over defense objection that jury should not draw any adverse inference from defendant's decision not to testify did not violate the 5th and 14th Amendment privileges).

Abandoning such forbearance, the Second Circuit determined that the particular questions in issue that respondent's counsel posed to Mr. Small were necessary to explore the effect of psychological condition upon the ability to identify. At no time during the proceedings, however, did counsel ever assert that the ruling had deprived respondent of his rights under the Confrontation Clause, prevented him from making an adequate cross-examination, or precluded him from exploring the effect of the victim's emotions upon his ability to identify respondent. Although counsel was denied the opportunity to approach the bench during cross-examination, he failed to employ any other means to apprise the court and, as a result, left the record barren as to what he was trying to establish and its import. On collateral review, though, the Second Circuit has imbued the questions with unwarranted significance.

The questions concerning how Mr. Small felt about the words uttered by the robber were vague or irrelevant; in the absence of any context, the court would have had no reason to know why counsel was focusing upon Mr. Small's "feel-

ings" about the robber's "words." The court could properly have determined that the question, "Were you scared?" the only question arguably germane, had already been asked and answered since Mr. Small testified previously on cross-examination that he had been "surprised" when respondent appeared from behind the van (T. 46). In addition, these questions could have been viewed as superfluous; it is self-evident that a robbery victim would have an emotional reaction, but not apparent why it should be necessary to question the victim about it in any detail.

Defense counsel's attempt to question Mr. Small concerning whether he had been robbed previously was improper because Mr. Small's answer could not have been known and it is a matter of rank speculation as to the effect, if any, of an earlier crime. Previous experience may make a particular victim either a better observer because he remains calm or a worse one because he reacts with greater emotion. In addition, the questioning would invite discussion of other crimes and a comparison of those crimes to the one at issue in the case. The trial court could, therefore, appropriately prevent a mini-trial on an irrelevant subject that might tend to confuse the jurors. *See Delaware v. Van Arsdall*, 475 U.S. at 679.

Consequently, whether or not the trial court could have ruled differently as to some of the questions, there is no basis to conclude that the court's rulings offended the Constitution. State courts have the right to limit superfluous, potentially confusing, or irrelevant questions on cross-examination and exercise judicial discretion concerning the scope of cross-examination. *Delaware v. Van Arsdall*, 475 U.S. at 679.

In addition, the Second Circuit's decision should require review by this Court because of the conspicuous violation of Rule 52(a) of the Federal Rules of Civil Procedure, which mandates that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The Second Circuit either ignored or improperly refused to accept the factual findings of the District Court

that had resulted in the conclusion that any error concerning this issue was harmless. It never addressed the District Court's finding that Mr. Small had established through his testimony that he saw respondent *before* the crime and the attendant emotional response began, *i.e.*, when respondent emerged from behind a van and acted as though he were drunk. *Harper v. Kelly*, 704 F.Supp. at 379 (Appendix B, p. 14a). Further, the Second Circuit disregarded the District Court's finding that Mr. Small's identification of respondent was corroborated by Mr. Lester and that defense counsel was permitted lengthy cross-examination of those witnesses. *Harper v. Kelly*, 704 F.Supp. at 379 (Appendix B, p. 14a-15a). The court unreasonably rejected as salient the District Court's finding that defense counsel apprised the jury of the issue of emotional response in relation to identification: "I'm sure that both Mr. Lester and Mr. Small were very much afraid as any person would be with a gun stuck in your [sic] stomach especially, I'm sure, one that must appear to be twelve feet long" (T. 158-59), and that the trial court, in its charge to the jury, specifically included as one of the questions the jury must ask itself, "What was the mental and emotional state of the witnesses?" (T. 204). The refusal of a circuit court to adhere to factual findings by a district court regarding harmless error in a habeas corpus case has already been demonstrated an issue that this Court deems worthy of review on certiorari. *See McCleskey v. Zant*, No. 89-7024 (argued October 31, 1990).

Moreover, this Court has repeatedly held that a federal court may not reassess the credibility of witnesses it has not observed. *Marshall v. Lonberger*, 459 U.S. 422 (1983); *Maggio v. Fulford*, 462 U.S. 111, 113 (1983), *reh. denied*, 463 U.S. 1236 (1983). Here, however, the Second Circuit acted as a fact-finder in regard to credibility when it stated that Mr. Lester's testimony "could not have carried much weight with the jury because cross-examination revealed that Lester did not identify Harper as the gunman during their extended face-to-face encounter in Sears' security office just three weeks after the robbery." *Harper v. Kelly*, 916 F.2d at

57 (Appendix A, p. 7a). What the Second Circuit neglected to consider is Mr. Lester's testimony that he did not recognize respondent at that time because not only was respondent's appearance different then but also because another security officer had made the arrest; he testified further that his attention had been directed elsewhere since in addition to speaking with employees and customers, he was involved in quelling a commotion caused by someone else detained for shoplifting (Lester: T. 95, 102-04, 107-08). Accordingly, it was not for the Second Circuit on collateral review, but the jury, who heard defense counsel's cross-examination of Mr. Lester, to determine whether his testimony credibly corroborated Mr. Small's identification of respondent. The Second Circuit's violation of Rule 52(a), therefore, should compel this Court to exercise its supervisory power to review the decision.

CONCLUSION

FOR THESE REASONS, A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT AND OPINION OF THE SECOND CIRCUIT.

Respectfully submitted,

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December 1990

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 1160, Docket 89-2364

Argued May 14, 1990 Decided Oct. 10, 1990

ELMER HARPER, JR.,

Petitioner-Appellant,

v.

WALTER R. KELLY, Superintendent,
Attica Correctional Facility,

Respondent-Appellee.

David A. Lewis, New York City (The Legal Aid Soc., Federal Defender Services Appeal Unit), for petitioner-appellant.

Stanley R. Kaplan, Bronx, N.Y. (Robert T. Johnson, Dist. Atty. of Bronx County, Billie Manning, Asst. Dist. Atty., of counsel), for respondent-appellee.

Before OAKES, Chief Judge, PRATT, Circuit Judge, and LEVAL, District Judge.[1]

OAKES, Chief Judge:

This habeas corpus action calls on us to consider the extent to which a trial court may restrict a defendant's cross-examination of crucial eyewitness identification testimony. Specifically, we are faced with a state trial court's evidentiary

1 The Honorable Pierre N. Leval, of the United States District Court for the Southern District of New York, sitting by designation.

ruling that precluded inquiry into a victim's emotional state during an armed robbery, when the victim made observations that formed the basis of his identification of the defendant. Finding that the court infringed upon the defendant's Sixth Amendment right to confront his accusers by disallowing this significant line of inquiry and that the error was not harmless, we reverse the dismissal of the habeas corpus petition, 704 F.Supp. 375, and remand with instructions to grant the writ conditionally.

BACKGROUND

At approximately 8 P.M. on May 9, 1984, Jack Small, the service manager of the Sears Auto Center on Fordham Road in the Bronx, stuffed the day's cash receipts of around $4,000 into his vest pocket and, accompanied by security supervisor Frank Lester, walked across the parking lot to drop the money off at the main store. It was dusk and the lights in the parking lot were not yet on. As Small and Lester crossed the parking lot, a man wearing a black rain hat and dark sunglasses surprised them from behind a van and demanded that Small hand over the vest. After Lester told Small not to cooperate, the man pulled a gun from his waist, put it to Small's stomach, repeated his demand and threatened to "blow [Small's] fuckin' head off." Small then handed over the vest, and the man left. The entire incident lasted about 30 seconds.

Three weeks after the robbery, on May 29, 1984, petitioner Elmer Harper, Jr. was arrested for shoplifting at a Sears department store and taken to the store's security office, where he was detained for an hour until the police arrived. Lester, who also happened to be present in the security office, was able to see Harper and hear him speak. Nonetheless, Lester did not identify Harper as the May 9th gunman at that time. It was not until July 31, 1984—nearly three months after the robbery—that Lester and Small identified Harper in a police lineup as the person who had robbed them.

Based on the eyewitnesses' identifications, Harper was charged with first-degree robbery. Harper's first trial, in February 1985, ended in a mistrial with eleven of the twelve jurors voting for acquittal. During Harper's October 1985 retrial, defense counsel sought to probe the reliability of Small's eyewitness identification by cross-examining him about his emotional state during the robbery. As the following excerpt from the trial transcript shows, the trial judge cut off all such questioning:

> Defense Counsel: So, the very first time you had an idea there was going to be any kind of a problem here was when somebody bumps into you and tells you to give him the vest, is that correct?
>
> Witness: Yes, sir.
>
> Defense Counsel: How did you feel when those words were said?
>
> Prosecutor: Objection.
>
> The Court: Sustained.
>
> Defense Counsel: Did you have a reaction when those words were said to you?
>
> Prosecutor: Objection.
>
> The Court: Sustained.
>
> Defense Counsel: Were you scared?
>
> Prosecutor: Objection.
>
> The Court: Sustained.
>
> Defense Counsel: Had you ever been the victim of a robbery before?
>
> Prosecutor: Objection.
>
> The Court: Sustained.
>
> Defense Counsel: May I approach?
>
> The Court: No, you may not.
>
> Defense Counsel: May I approach?
>
> The Court: No, you may not.

Harper was eventually convicted of first-degree robbery and sentenced as a second felony offender to a prison term of ten to twenty years. The Appellate Division affirmed Harper's conviction without opinion, *People v. Harper*, 123 A.D.2d 528, 506 N.Y.S.2d 502 (1st Dep't 1986), and the Court of Appeals denied his application for leave to appeal. *People v. Harper*, 68 N.Y.2d 1001, 510 N.Y.S.2d 1033, 503 N.E.2d 130 (1986). Harper subsequently filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254 (1988), in the United States District Court for the Southern District of New York alleging, *inter alia*, that the trial court's rulings concerning Small's cross-examination violated Harper's Sixth Amendment right to confront the witnesses against him.

DISCUSSION

The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Of all the rights covered by the Confrontation Clause, the right to cross-examine witnesses is perhaps the most important. In its earliest decision interpreting the Confrontation Clause, the Supreme Court wrote that cross-examination gives the accused an opportunity to "test[ ] the recollection and sift[ ] the conscience of the witness. . . ." *Mattox v. United States*, 156 U.S. 237, 242, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895). Twenty years ago, the Court called cross-examination the " 'greatest legal engine ever invented for the discovery of truth.' " *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970) (quoting 5 J. Wigmore, Evidence § 1367 (3d ed. 1940)). Most recently, the Court reiterated this point: "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, ____ U.S. ____, 110 S.Ct. 3157, 3163, 111 L.Ed.2d 666 (1990).

The right to cross-examine witnesses is especially critical when the only evidence against an accused is eyewitness identification. We have noted on several occasions the potential unreliability of convictions obtained on the basis of such evidence. In *Jackson v. Fogg*, 589 F.2d 108, 112 (2d Cir.1978), a case involving a suggestive police lineup, we stated:

> Centuries of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect. Of all the various kinds of evidence it is the least reliable, especially where unsupported by corroborating evidence.

We also addressed this concern in *Kampshoff v. Smith*, 698 F.2d 581, 585 (2d Cir. 1983), where we wrote:

> There can be no reasonable doubt that inaccurate eyewitness testimony may be one of the most prejudicial features of a criminal trial. . . . [W]hile juries may be led by their experience to believe their eyes, and, by inference, what they hear from those who have seen, that eyewitness testimony may sometimes be the least trustworthy means to identify the guilty.

We take this opportunity to reaffirm those concerns. When identification of the defendant depends solely on eyewitness testimony, the defendant must be afforded a meaningful opportunity to probe the reliability of that testimony. One of the most significant means to probe such testimony can be to question the witness about this thoughts and fears at the time of the crime. A jury's conclusions might well be affected by whether an eyewitness either remained calm during the robbery and had a good look at the perpetrator or was so frightened that he could not see straight. Such testimony would be highly probative of the reliability of the witness' subsequent identification. *See, e.g., United States v. Smith*, 563 F.2d 1361, 1363 (9th Cir.1977) ("Any emotion, such as extreme fright, experienced by the witness during the criminal ordeal which might lessen the value of his later selection of the

accused as the culprit ought to be weighed carefully."), *cert. denied*, 434 U.S. 1021, 98 S.Ct. 747, 54 L.Ed.2d 769 (1978).

On cross-examination, the defense sought to inquire into Small's thoughts and fears during his brief encounter with the gunman. The purpose of this aborted inquiry was to probe the reliability of Small's identification of the defendant, the critical issue in the trial. We know of no evidentiary basis to completely preclude this line of inquiry. Because the trial court's erroneous rulings denied the defendant a meaningful opportunity to impeach the reliability of a crucial eyewitness identification, we find that Harper's rights under the Confrontation Clause of the Sixth Amendment were violated.

In so ruling, we reaffirm, as did the Supreme Court in *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), that "trial judges retain wide latitude, insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination. . . ." *Id.* at 679, 106 S.Ct. at 1435. All erroneous rulings that improperly restrict cross-examination under state or federal rules of evidence do not necessarily implicate the Confrontation Clause. Rather, the Constitution only " 'guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective, in whatever way, and to whatever extent, the defense might wish.' " *Id.* (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985) (per curiam)). In this case, the vital importance of the opportunity to probe the reliability of the identification and the trial court's total preclusion of cross-examination readily implicate the constitutional guarantee.

The state argues and the district court held that the resulting Confrontation Clause error, if any, was harmless. In order to determine whether an error is harmless, a court must consider many factors, including:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted,

> and, of course, the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684, 106 S.Ct. at 1438. Most important, a Confrontation Clause error is harmless only if, "assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Id.* We disagree with the district court's holding and find that the state failed to meet its heavy burden of proving harmless error.

In Harper's case, which was based solely on eyewitness identification, the only eyewitness to the robbery other than Small was Lester. Lester's testimony, however, could not have carried much weight with the jury because cross-examination revealed that Lester did not identify Harper as the gunman during their extended face-to-face encounter in Sears' security office just three weeks after the robbery. It was not until a police lineup over two months later that Lester finally identified Harper. Accordingly, Small's testimony was the key (and perhaps the only) evidence that the jury considered in convicting Harper.

The state claims that Harper had the opportunity in his summation to argue that the fear of injury might have distorted Small's perceptions. This argument is unavailing for the simple reason that, as juries are admonished during every trial, counsel's arguments cannot substitute for actual evidence. Similarly, the state cannot rely on the fact that the judge instructed the jury to consider "all the circumstances surrounding the crime," including "the mental and emotional state of the witnesses." Indeed, given this jury instruction, which appears to recognize the importance of the very testimony that the judge excluded, we have difficulty understanding why the judge sustained the state's objections.

Judgment reversed and case remanded with instructions to issue the writ unless the state, within a reasonable time not to exceed sixty (60) days, grants the petitioner a new trial.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT New York

No. 88 Civ. 1163 (RWS)

Jan. 4, 1989

ELMER HARPER, JR.,

Plaintiff,

v.

WALTER R. KELLY,

Defendant.

Elmer Harper, Jr., Comstock, N.Y., pro se.

Paul T. Gentile, Dist. Atty., Bronx County, Bronx, N.Y., for defendant; Stanley R. Kaplan, Asst. Dist. Atty., of counsel.

OPINION

SWEET, District Judge.

Pro se petitioner Elmer Harper, Jr. ("Harper") seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on the grounds that his conviction was obtained in violation of his constitutional rights. For the reasons set forth below, his petition is denied.

The Facts and the Petition

On May 9, 1984, Jack Small ("Small"), the service manager at the Sears Auto Center on Fordham Road in the Bronx, was instructed to take the day's cash receipts across

the parking lot to the main store. Frank Lester ("Lester"), a security supervisor for Sears, accompanied Small. This was the first time that Small had been asked to take the cash to the main store. Small put a bag containing approximately $4,000 in cash into his vest pocket and began to walk across the parking lot with Lester. It was dusk, and the lights in the parking lot were not yet on, but Small testified that there was plenty of light.

As Small and Lester were crossing the lot, a man came from beyond a van, surprising them. The man asked Small for his vest; Lester told Small not to give the vest to him. The man pulled a gun from his waist, put it to Small's stomach, and told Small to give him the vest or he would "blow [his] fuckin' head off." Small gave the man the vest containing the money, and the man left. The incident lasted approximately 30 seconds.

Small and Lester contacted the police and described the robber as a Black man wearing a black rain hat that covered his hair, dark sunglasses, and various items of black clothing. Small said that the man had no mustache or beard; Lester said he had a small mustache.

Three weeks later, on May 29, 1984, Harper was arrested by another security officer for shoplifting at Sears. Lester spent an hour in the security office with Harper waiting for the police to arrive, and he heard Harper speak, but he did not recognize Harper as the robber from three weeks earlier.

On July 31, 1984, twelve weeks after the robbery, first Small and then Lester identified Harper at a lineup as the perpetrator of the May 9 robbery. Each participant at the lineup wore a hat and sunglasses. Shortly after Small was brought into the viewing room, the flood lights in the lineup room went out. Thus, apart from the first few seconds, only the fluorescent ceiling lights in the lineup room were on when Small viewed the lineup. Similarly, Lester observed the lineup with only the ceiling lights. Harper was sitting in the number one position.

The Trial

Harper was charged with First Degree Robbery. His first trial, held in February 1985, resulted in a mistrial with the jury split eleven to one for acquittal. He was convicted after his second trial on October 4, 1985. Harper was sentenced as a second felony offender to a term of ten to twenty years imprisonment.

The main issue at Harper's trial was the identification of Harper as the perpetrator of the robbery. During defense counsel's cross-examination of Small, the prosecution objected to questions about Small's emotional state during the robbery, and to the question of whether Small had ever been robbed before. The Court sustained the prosecutor's objections to these questions and twice denied defense counsel's request to approach the bench. Counsel was subsequently permitted to ask Lester, over the prosecutor's objection, whether he had ever been the victim of a robbery. Lester said that he had not.

In his summation, Harper's attorney told the jury that there was no evidence upon which it could conclude that Harper was guilty of the robbery other than the identification testimony of Small and Lester, and he argued that Small and Lester were "honestly mistaken" in their identification of Harper as the robber. The defense counsel also hinted that the lineup was unfair. In response, the prosecutor in his summation said that the defense was a "shotgun defense" and that it was full of "red herrings." The prosecutor also argued that neither Small nor Lester had a "motive to lie" in their identification of Harper as the perpetrator of the robbery, and that they would not accuse Harper of robbery "for the heck of it." Finally, he indicated his belief that the lineup had been fair, reminding the jury that all five men in the lineup were Black, and that all were wearing sunglasses, hats, and the same color jackets.

On September 30, 1986, Harper's conviction was affirmed without opinion by the Appellate Division of the Supreme Court. *People v. Harper*, 123 A.D.2d 528, 506 N.Y.S.2d 502 (1st Dept. 1986). On November 24, 1986, the State of New

York Court of Appeals denied his application for leave to appeal. *People v. Harper*, 68 N.Y.2d 1001, 510 N.Y.S.2d 1033, 503 N.E.2d 130 (1986).

In his petition for a writ of habeas corpus, Harper alleges as Ground One that the trial court deprived him of his Sixth Amendment right to confront witnesses against him by precluding defense counsel from questioning the prosecution's principal identification witness, Small, about his emotional state at the time of the robbery. Harper argues that such questioning was central to his claim of mistaken identification, for Small's emotional state affected his ability to observe the robber and to recognize him later. Harper alleges as Ground Two that the prosecutor violated his Fourteenth Amendment due process right to a fair trial by unfairly criticizing the defense counsel and his arguments, by raising false arguments, and by interjecting his opinions in his summations.

Exhaustion

According to 28 U.S.C. §§ 2254(b) and (c), a state prisoner's application for a writ of habeas corpus in a federal court will not be granted unless the applicant has exhausted his state court remedies. When a petition for habeas corpus contains a mixture of exhausted and unexhausted claims, it must be dismissed by the district court. *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1981).

The State argues that Harper failed to put the state court on notice of his second federal claim, his objection to the prosecutor's summation, for he did not demonstrate:

> a) reliance on pertinent federal cases employing constitutional analysis, b) reliance on state cases employing constitutional analysis in like fact situation as, assertion of the claims in terms so particular as to call to mind a specific right protected by the Constitution, and c) allegation of a pattern of facts well within the mainstream of constitutional litigation.

Daye v. Attorney General of New York, 696 F.2d 186, 194 (2d Cir. 1982). The State also cites *Petrucelli v. Coombe*, 735 F.2d 684, 690 (2d Cir. 1984) for the proposition that a petitioner's allegation that he or she was denied a "fair trial" does not assert a specific constitutional right. Moreover, the State says that in his application for leave to appeal to the Court of Appeals, Harper raised as the only issue for appellate review the claim now designated as Ground One, and thereby compounded his failure to exhaust his state remedies as to his claim of prosecutorial misconduct.

While it is true that Harper failed to cite specific state or federal cases employing a constitutional analysis to support the second ground of his petition for habeas corpus, in his brief to the Appellate Division, First Department, he cited the Fourteenth Amendment of the United States Constitution in relation to his complaint against the prosecutor's summation. This reference to a specific constitutional amendment is sufficient to have put the State on notice of Harper's federal constitutional claim. *See Daye v. Attorney General of New York*, 696 F.2d at 192 ("if the petitioner has cited the state courts to the specific provision of the Constitution relied on in his habeas petition, he will have fairly presented his legal basis to the state courts"). In addition, because Harper submitted a copy of his brief to the Appellate Division in his application for leave to appeal to the Court of Appeals, the Court of Appeals was on notice of both of defendant's constitutional claims, despite the fact that a letter to the Court of Appeals in support of the application for leave to appeal highlighted only Harper's first claim. Therefore, Harper has exhausted his state court remedies.

Failure to Object

The State also argues that Harper's petition must be dismissed because Harper did not object at trial to the trial court's decision to preclude the defense from questioning Small as to his emotional state, or to the prosecutor's "misconduct" on summation, as required by N.Y.C.P.L.

§ 470.05(2).[1] As to Ground One of the petition, Harper objected adequately to preserve his right to appeal. After the trial court sustained the prosecutor's objection to questions about Small's emotional state, Harper's attorney twice requested a side-bar conference, but the judge denied his request. As for Ground Two, prosecutorial misconduct at summation, Harper's defense counsel objected only once to a particular statement in the summation, an objection which the trial judge overruled. However, this does not preclude this court from considering the issue of the summation on the merits, for where the procedure followed at trial was at variance with the Constitution, there is an exception to the rule that an issue is not preserved for review when no objection is given. *People v. Andrews*, 109 A.D.2d 939, 486 N.Y.S.2d 428, 430-31 (3d Dept. 1985). Thus, Harper's petition for a writ of habeas corpus cannot be denied on procedural grounds.

The Right to Confront Witnesses as to Emotional State

A defendant has a fundamental right to confront witnesses against him. U.S. Const. amend. VI; *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 1109-10, 39 L.Ed.2d 347 (1974). Further, "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. *Id.* at 316, 94 S.Ct. at 1110. Although

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1 Section 470.05(2) states:

For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same. Such protest need not be in the form of an "exception" but is sufficient if the party made his position with respect to the ruling or instruction known to the court. In addition, a party who without success has either expressly or impliedly sought or requested a particular ruling or instruction, is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule or instruct accordingly sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered.

the scope of cross-examination is within the discretion of the trial court, *see, e.g., Davis v. Alaska*, 415 U.S. at 316, 94 S.Ct. at 1110; *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1985) ("trial judges retain wide latitude insofar as the Confrontation Clause is concerned"), the discretionary authority is subject to the 6th Amendment standard. *United States v. Lindstrom*, 698 F.2d 1154, 1160 (11th Cir.1983). *See also Alford v. United States*, 282 U.S. 687, 692 51 S.Ct. 218, 219, 75 L.Ed. 624 (1931) ("it is the essence of a fair trial that reasonable latitude be given to the cross examiner.").

Harper argues that the right to confront witnesses gives a defendant a right to cross examine an identification witness on the circumstances under which he or she saw the perpetrator, and cites cases to support his position that the emotional reaction of a robbery victim can have a bearing upon his or her identification. *United States v. Smith*, 563 F.2d 1361, 1363 (9th Cir.1977), *cert. denied*, 434 U.S. 1021, 98 S.Ct. 747, 54 L.Ed.2d 769 (1978); *Dickerson v. Fogg*, 526 F.Supp. 1299, 1307-1308 (S.D.N.Y.1981), *aff'd*, 692 F.2d 238 (2d Cir.1982). However, these cases are not applicable here. In *Dickerson*, there was no opportunity for the victim to see the robber before the attack began. Here, however, Lester and Small observed the assailant emerge from behind a van prior to the commission of the crime. Thus, they had the opportunity to view the robber before the crime and the attendant emotional response began. As for *United States v. Smith*, although the Second Circuit's opinion contains dicta that emotional factors are relevant in identification, the Court upheld the eyewitness identification, and held that "[w]hen there is some corroboration of [identification] . . . testimony, even greater reason exists for upholding the verdict of a jury which accepted it." 563 F.2d at 1363. In this case, Lester's identification of Harper as the perpetrator corroborates Small's testimony.

It is not necessary to reach the question of whether the refusal to allow cross-examination of Small's emotional state was a violation of Harper's constitutional rights, for even if Harper's rights were violated, the violation would be harm-

less error. In *Delaware v. Van Arsdall*, the Supreme Court held that harmless error analysis applies to "the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias." 475 U.S. at 684, 106 S.Ct. at 1438. Similarly, it applies to the denial of Harper's opportunity to question Small about his emotional state.

To determine whether an error is harmless, it is necessary to examine a variety of factors, including:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id. Here, Harper was permitted lengthy cross-examination of Small and Lester. Although Lester's identification testimony was weakened by his failure to identify Harper as the robber when he was arrested for shoplifting, Lester provided additional, corroborating eyewitness identification confirming Small's identification of Harper. Moreover, Harper's counsel was permitted in his summation to argue that Small's emotional response to being robbed at gunpoint would have been one of fear, and he told the jury "I'm sure that both Mr. Lester and Mr. Small were very much afraid as any person would be with a gun stuck in your stomach especially, I'm sure, one that must appear to be twelve feet long." Finally, in its charge to the jury, the court included as a question the jury must ask itself: "[w]hat was the mental and emotional state of the witness?" Therefore, even if it was error for the trial court to preclude cross-examination on Small's emotional state, the error was harmless.

Summation

Harper's second ground for his petition for a writ of habeas corpus is that the prosecutor violated his due process right to a fair trial by criticizing and denigrating defense

counsel and the defense with false arguments, vouching for his witnesses and interjecting his opinion as to the fairness of the lineup. As the Second Circuit explains, in *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974), the Supreme Court indicated that "constitutional error occurs only when the prosecutorial remarks were so prejudicial that they rendered the trial in question fundamentally unfair." *Garofolo v. Coomb*, 804 F.2d 201, 206 (2d Cir.1986). In this case, the prosecutor's summation comments do not rise to the level of a constitutional violation.

First, the terms "shotgun defense" and "red herrings" are merely rhetorical tactics which do not exceed the broad range of rhetorical comments allowed in closing arguments. *See People v. LaForge*, 483 N.Y.S.2d 842, 843, 107 A.D.2d 896, 897 (3d Dept. 1985) (prosecutor's description of the defense as "throwing up a smokescreen" was not "so egregious as to deny defendant her Constitutional right to a fair trial . . ."); *United States v. Marrale*, 695 F.2d 658, 666 n.9 (2d Cir. 1982), *cert. denied*, 460 U.S. 1041, 103 S.Ct. 1434, 75 L.Ed.2d 793 (1983) (characterization of defense as "woven out of the thread of desperation and thread that unwravel [sic] before you . . ." did not deprive defendant of a fair trial); *U.S. v. Peterson*, 808 F.2d 969, 977 (2d Cir.1987) (reference to witness's rap sheet as "longer than the jury rail" was not improper). Moreover, the comments in no way "inflame the passions or prejudices of the jury," which the American Bar Association Standard 3-5.8(c) deems improper. *See United States v. Marrale*, 695 F.2d at 667 (prosecutor's admonishing jury not to "be fooled" by the defense arguments did not inflame the passions); *U.S. v. Peterson*, 808 F.2d at 977 (2d Cir.1987) (characterization of a witness' testimony did not have the purpose of appealing to the jury's emotions).

Second, the prosecutor's contention that Small and Lester were not the kind of people who would accuse someone of a robbery "for the heck of it," and his statement that neither Small nor Lester had a motive to lie, was not a constitutional violation. *See United States v. Ricco*, 549 F.2d 264, 274 (2d

Cir.), *cert. denied*, *Indiviglia v. United States*, 431 U.S. 905, 97 S.Ct. 1697, 52 L.Ed.2d 389 (1977) (remarks by prosecutor that government accomplice witnesses would be subject to indictment for perjury and previously uncharged offenses in the event they testified falsely constituted permissible argument that the witnesses had no motive to testify falsely).

As for the prosecutor's characterization of the lineup as fair, it is not a violation of Harper's constitutional rights in light of the evidence provided at trial and the fact that the defense had questioned the fairness of the lineup. *See U.S. v. Marrale*, 695 F.2d at 667 ("since a prosecutor is ordinarily entitled to respond to the evidence, issues and hypotheses propounded by the defense," the court did not find the summation to be improper) (citations omitted).

Conclusion

For the reasons discussed above, Harper's petition for a writ of habeas corpus is dismissed. Probable cause to appeal this opinion is granted.

It is so ordered.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WALTER R. KELLY, Superintendent,
Attica Correctional Facility,

Petitioner,

-v.-

ELMER HARPER, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether preclusion of cross-examination of the prosecution's crucial eyewitness concerning his mental and emotional state during a thirty-second gunpoint robbery -- an issue directly relevant to the reliability of his eyewitness identification testimony -- violated the Confrontation Clause?

2. Whether the preclusion of cross-examination of the crucial witness in the case on a matter relevant to the crucial issue in the case was harmless where the prosecution's case was based entirely on eyewitness identification testimony, where the victims lacked substantial opportunity to view the robber, where one victim initially failed to identify Harper as the robber because Harper "looked different" than the robber did, and where the first jury to hear the case deadlocked eleven-to-one for acquittal?

3. Whether the court of appeals violated Rule 52(a) of the Federal Rules of Civil Procedure where it "set aside" no factual finding of the district court, and whether this Court should grant certiorari on this issue, which petitioner did not raise in the court of appeals?

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WALTER R. KELLY, Superintendent,
Attica Correctional Facility,

Petitioner,

-v.-

ELMER HARPER, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is published at 916 F.2d 54. The opinion of the district court (Pet. App. 8a-17a) is reported at 704 F. Supp. 375. On Harper's direct appeal in state court, the New York State Supreme Court, Appellate Division, First Department, affirmed his conviction without opinion in a disposition reported at 123 A.D.2d 528 (1st Dept. 1986). The New York State Court of Appeals denied his application for leave to appeal at 68 N.Y.2d 1001 (1986).

STATEMENT OF THE CASE

Elmer Harper, Jr., was indicted in Bronx County, New York, by indictment number 2873/84, and charged with the gunpoint robbery of Jack Small, which took place on May 9, 1984. Harper was tried twice for this crime. The principal, indeed the only, issue at both trials was whether Harper was accurately identified as the robber. The first trial lasted one day. The jury deliberated for a day and a half, but a mistrial was declared with the jury hung eleven to one for acquittal. Pet. App. at 10a. At the second trial, before the Hon. George D. Covington and a jury, the testimony took but a morning, and the jury deliberated nearly until midnight before being sequestered. The next day it deliberated into the afternoon before finding petitioner guilty of one count of robbery in the first degree.

The Crime

At about 8:00 p.m. on May 9, 1984, Jack Small, the service manager of a Sears Auto Center in the Bronx, put the day's cash receipts in his vest and carried them across a parking lot to the main Sears store. He was accompanied by security supervisor Frank Lester. It was dusk, and the lights in the parking lot were not yet on. As Small and Lester crossed the lot, a man wearing sunglasses, a black rain hat pulled down over his hair and black clothing, came from behind a van. The man put a gun in Small's waist and

demanded the money. Lester told Small not to give it up, but the man threatened to "blow [Small's] fuckin' head off" and Small gave him the vest containing $4000. 28-30, 65, 78-79.[1] The whole incident lasted only about 30 seconds, and Small acknowledged that during this brief period had been looking at the gun the man was holding as well as at the man himself.

No one was identified or apprehended as a suspect in this crime until long after it occurred.

Lester's Failure to Identify Harper as the Robber

Three weeks after the crime, Harper was arrested for shoplifting by Mr. Ducaran, a Sears employee, just outside the Sears store. Lester, who was Sears's security supervisor, went out and assisted with the arrest. He and Ducaran escorted Harper to the Sears security office where Lester spent the next hour with Harper, while Ducaran photographed him and completed paperwork. Lester did not identify Harper as the man who had robbed him three weeks before.

At trial, Lester said he did not recognize Harper as the robber because he "looked different" (82), and he explained:

> I didn't know I was going to apprehend him with Mr. Ducaran. Looking at him the way he looked then and looking at him when he robbed us he looked different. Nothing crossed my mind, sir whether that was him or not, whether it was the robber

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[1] Numerical citations are to the trial transcript.

or not.

92. Initially, however, at the Wade hearing in the case, Lester had said he did not recognize Harper at the time of the shoplifting arrest because "[a]t the time that he was arrested we didn't know who -- we didn't know he was that person." Transcript of Wade hearing at 52.

The Photographic Display and Lineup

Lester apparently first came to "know [Harper] was that person" as the result of a photographic identification held on June 7, 1984, about a week after he had met Harper at the shoplifting episode. Officer James Sullivan showed him and Small an array of photographs. Neither Lester nor Small could remember what photographs they had been shown, except those of Harper. Officer Sullivan produced at the Wade hearing six photographs he had shown the two men. Of these six, two were of Harper. In one of these two, Harper was wearing sunglasses, as had the robber, and in the other he was without glasses. The remaining four photographs were of other men not wearing sunglasses. This selection of six photographs by itself was clearly highly suggestive, for Harper was represented twice and was wearing garb like that of the robber in one photograph.

Officer Sullivan testified, however, that, in addition to the six photographs he was able to produce, he had shown Small and Lester four other photographs and that these four

happened to have been two additional pairs of photographs of men with and without sunglasses. Sullivan claimed that these two additional pairs had been kept in the same file with the other six pictures, but had disappeared. He could not explain what had happened to them. It was from this array of ten, rather than six, photographs, Sullivan testified, that Small and Lester picked Harper's picture. Even the ten-photograph array tended to suggest, however, that the police suspected one of the three men, including Harper, who were pictured in sunglasses.

Nearly three months after the crime, on July 31, 1984, Small and Lester identified Harper in a police lineup as the robber.

The Cross Examination of Small at Trial

On cross-examination at trial, defense counsel sought to elicit information from Small about his mental and emotional state during the crime. He asked several questions along this line, all of which were thwarted by objections from the prosecutor that were sustained by the court:

> Q. So, the very first time you had an idea there was going to be any kind of a problem here was when somebody bumps into you and tells you to give him the vest, is that correct.
>
> A. Yes, sir.
>
> Q. How did you feel when those words were said?

[Prosecutor]: Objection.
THE COURT: Objection sustained.

Q. Did you have a reaction when those words were said to you?

[Prosecutor]: Objection.
THE COURT: Objection sustained.

Q. Were you scared?

[Prosecutor]: Objection.
THE COURT: Objection sustained.

Q. Had you ever been the victim of a robbery before?

[Prosecutor]: Objection.
THE COURT: Objection sustained.
[Defense counsel]: May I approach?
THE COURT: No, you may not.
[Defense counsel]: May I approach?
THE COURT: No, you may not.

46-47. The trial court then instructed the jury that its rulings were on issues of law, and were not the jury's concern, and directed counsel to proceed. Defense counsel was allowed no other cross-examination of Small concerning his emotions or mental state while he was being robbed, a gun was pointed at him, and his life was threatened.

The Summations

Defense counsel argued in summation that both Small and Lester were "honestly mistaken" in their identifications of Harper as the robber. Counsel noted that neither man got a

good look at the perpetrator and argued that Lester's lack of recogition of Harper just three weeks after the crime showed that the identifications were unreliable. Counsel argued in addition that "I'm sure that both Mr. Lester and Mr. Small were very much afraid as any person would be with a gun stuck in your stomach, especially, I'm sure, one that must appear to be twelve feet long." 158-59.

In the course of the summations, the judge instructed the jury that "[w]hat Counsel on either side of this case says is not evidence," but only "argument." 172.

Charge, Deliberations, Verdict, and Sentence

The court submitted only one count to the jury, robbery in the first degree, and instructed the jury, inter alia, that the People had to prove Harper's identity as the perpetrator beyond a reasonable doubt. In the course of its charge, the court noted that in assessing the identification testimony, the jury could consider "[w]hat was the mental and emotional state of the witness." 204. And the court further charged that the "jury's sworn duty" was to decide the case "solely on the evidence admitted during the trial." 182-83.

The jury commenced its deliberations at noon on September 11, 1985. It deliberated all the rest of that day and into the night, until, at 11:00 p.m., it was sequestered. The following morning, September 12, 1985, the jury asked for and received a reading of the direct testimony of Small and

Lester, and re-instruction on the criteria to use in deciding whether to accept a witness's testimony. The jury returned with its verdict that afternoon, finding Harper guilty of robbery in the first degree.

On October 4, 1985, Harper was sentenced as a second violent felony offender to ten to twenty years in prison.

The State Appeals and the Habeas Petition

Harper appealed his conviction claiming that the trial court's restrictions on his cross-examination of Small had violated his rights to confront the witnesses against him. On September 30, 1986, the New York State Supreme Court, Appellate Division, First Department, affirmed his conviction without opinion. People v. Harper, 123 A.D.2d 528 (1st Dept. 1986). On November 24, 1986, the New York State Court of Appeals denied his application for leave to appeal. People v. Harper, 68 N.Y.2d 1001 (1986).

Harper filed a petition for a writ of habeas corpus again raising his confrontation claim. The district court correctly characterized Harper's argument as being that the "right to confront witnesses gives a defendant a right to cross examine an identification witness on the circumstances under which he or she saw the perpetrator," Pet. App. at 14a, and the court noted that Harper cited cases indicating that "the emotional reaction of a robbery victim can have a bearing upon his or her identification." Pet. App. at 14a.

Althought the court stated that these principles were "not applicable" in Harper's case, it did not reach the consitutional issue but instead determined that any error committed was harmless. Pet. App. at 14a. This was so, the court held, because Harper had been able to cross-examine Small and Lester on other subjects, because Lester's testimony, although weak, corroborated Small's, because defense counsel hypothesized in summation that Small and Lester had been afraid, and because the trial court had instructed that jury that it could consider "the mental and emotional state of the witness." Pet. App. at 15a.

The Court of Appeals Opinion

The court of appeals held that the preclusion of all inquiry into the victim's emotional state during his observation of the robber, which formed the basis for identification of the defendant, violated the defendant's Sixth Amendment right to confront his accusers and was not harmless in this case. Pet. App. at 1a-2a. The court noted that the "central concern" of the Confrontation Clause was to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Pet. App. at 4a, citing Maryland v. Craig, 110 S. Ct. 3157, 3163 (1990), a concern that was "especially critical when the only evidence against an accused is eyewitness identification." Pet. App.

at 5a. In such cases, "the defendant must be afforded a meaningful opportunity to probe the reliability of that testimony," and "one of the most significant means to probe such testimony can be to question the witness about his thoughts and fears at the time of the crime." Pet. App. at 5a. Because the trial court had denied the defendant a "meaningful opportunity" to impeach the witness on this basis, the court held that Harper's rights under the Confrontation Clause had been violated. Pet. App. at 6a.

The court of appeals also held that the error was not harmless under the standard set out by this Court in Delaware v. Van Arsdall, 475 U.S. at 684. The court noted that the case was "based solely on eyewitness identification" and that Small's testimony was the "key (and perhaps the only) evidence that the jury considered in convicting Harper." The court found that, because Lester had initially not identified Harper as the gunman, his testimony could not have carried much weight with the jury, and Small's testimony, which had not been subject to full cross-examination, was crucial. Pet. App. at 7a. The court rejected the state's claim that the error was harmless because Harper was allowed to argue that fear might have affected Small's perceptions on the basis that "as juries are admonished during every trial, counsel's arguments cannot substitute for actual evidence." Pet. App. at 7a.

ARGUMENT

Petitioner contends that the court of appeals erred in finding a violation of the Confrontation Clause of the Sixth Amendment in a case where the state trial court precluded all cross-examination into the mental and emotional state of the crucial identification witness at the time he observed the perpetrator of the crime. Petitioner also contends that if there was a violation of the Confrontation Clause, it was harmless and that the court of appeals erred in "set[ting] a ide" factual findings of the district court concerning harmless error that were not "clearly erroneous." Rule 52(a), Fed. R. Civ. Pro. The court of appeals, applying well-settled principles of constitutional law, correctly found a violation of the Confrontation Clause in this case, however, and also correctly found that that violation was not harmless. Petitioner's argument that the court of appeals violated Rule 52(a) was not presented below, and, in any event, petitioner does not identify any factual findings of the district court that the court of appeals actually "set aside" in this case. This case presents no issue upon which certiorari should be granted.

Petitioner first suggests that defense counsel's inquiries into the feelings and reactions of the witness at the time of the crime were "irrelevant" or were not "germane" to the case, see Pet. App. at 12-13, and were thus not proper

subjects of cross-examination. But, as the court of appeals recognized, such inquiries, which implicate the witness's ability to perceive and remember, are plainly proper. Pet. App. at 5a ("the most significant means to probe [identification] testimony can be to question the witness about his thoughts and fears at the time of the crime"). Indeed, petitioner's argument is foreclosed by the state trial court's charge in this very case, for the trial court instructed the jury as a matter of New York law that the "mental and emotional state of the witness" was relevant to their decision.[2]

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[2] This Court and others have also recognized the relevance of emotional factors in assessing the reliability of an identification. See, e.g., Manson v. Brathwaite, 432 U.S. 98, 111-12 (1977) (because of the "circumstances of emergency or emotional stress" involved in a witness's encounter with a criminal, "[t]he witness' recollection of the stranger can be distorted easily"); United States v. Smith, 563 F.2d 1361, 1363 (9th Cir. 1977), cert. denied, 434 U.S. 1021 (1978) (emotions such as fright "might lessen the value of [the witness's] later selection of the accused"); Dickerson v. Fogg, 526 F. Supp. 1299, 1307 (S.D.N.Y. 1981), aff'd 692 F.2d 238 (2d Cir. 1982) (that witness was "extremely shaken" might have lowered degree of attention to robber's face). The inquiry into the witness's mental or emotional state is, indeed, no more than an inquiry into the witness's ability to perceive and to remember, and as such it is without doubt a proper subject of cross-examination. See United States v. Owens, 108 S. Ct. 838, 842 (1988) ("attentiveness," "eyesight" and "memory" permissible subjects of cross-examination); Davis v. Alaska, 415 U.S. 308, 316 (1974) (cross-examiner may "test the witness' perceptions and memory").

Petitioner further argues, however, that "the Confrontation Clause does not prevent a trial judge from imposing reasonable limits on cross-examination." Pet. at 10. This principle is clearly true, of course, and the court of appeals explicitly recognized it, stating that "trial judges retain wide latitude, insofar as the Confrontation Clause is concerned to impose reasonable limits on ... cross-examination." Pet. App. at 6a, quoting Delaware v. Van Arsdall, 475 U.S. at 679. But the court of appeals correctly found that the trial court's rulings amounted to the "total preclusion of cross-examination" on an issue of "vital importance" in the case, Pet. App. at 6a, and thus exceeded the permissible "reasonable limits" on cross-examination.

Petitioner's argument to the contrary, see Pet. at 12-13, that the preclusion of cross-examination was justified, is frivolous. Petitioner argues that because defense counsel's questions were "vague," "potentially confusing" or "superfluous," the trial court could properly preclude all of them. Pet. at 12-13. Counsel's questions were neither "vague" nor "potentially confusing," however, but inquired directly of the witness what his feelings were as he learned he was being robbed, how he reacted to the demand for money, whether he was scared, and whether he had previously been the victim of a robbery. These were simple questions susceptible of simple answers. Nor were these questions "superfluous."

That Small had admitted that he was surprised by the appearance of a man before the robbery began did not make superfluous further inquiry to determine what his subsequent emotions or fears were as he first learned he was being robbed and as the robber then threatened to "blow [his] fuckin' head off." The court of appeals was correct in finding that there was "no evidentiary basis to completely preclude this line of inquiry." Pet. App. at 6a.

Petitioner claims, however, that the Court of Appeal's "ruling stands in opposition to every decision of this Court on the subject of the Confrontation Clause and on the extent of federal intervention on collateral review, and similarly is in conflict with the other circuit courts." Pet. at 9 (emphasis supplied). But petitioner does not identify a single case decided by this Court with which the decision below is in conflict. Nor does petitioner show the decision below to be in conflict with the decision of any other circuit court of appeals. None of the cases cited by petitioner, Pet. at 11, n.4, involves limitations on cross-examination of the crucial eyewitness in a case resting solely on eyewitness identification, and none of them conflicts with the decision of the court of appeals below.

Petitioner argues in the alternative that even if the trial court's rulings violated the Confrontation Clause, the violation was harmless error. The court of appeals consid-

ered this question and correctly set out the legal standard for determining whether such a confrontation violation is harmless. Pet. App. at 6a-7a. To make such a determination, a court must consider many factors, including:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. Van Arsdall, 475 U.S. at 684. Upon consideration of the relevant factors among these, the court can find an error harmless only if, "assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." Id.

Here the error was plainly not harmless beyond a reasonable doubt based upon the crucial importance of Small's identification, the absence of any real corroboration for Small's identification, the overall weakness of the prosecution's case, and the hung jury at Harper's prior trial. As the court of appeals noted, the case was one based solely on eyewitness testimony, and Small gave the "key (and perhaps the only) evidence that the jury considered in convicting Harper." Pet. App. at 7a. Although Lester's testimony purported to corroborate that of Small's, the jury would not

have been likely to rely on it, because Lester failed to identify Harper as the gunman when given an admirable chance to do so just three weeks after the crime. Pet. App. at 7a; see Olden v. Kentucky, 109 S. Ct. at 484 (corroborating testimony of witness Russell did not render error harmless because it was "derivative" and had been "somewhat impugned"). Thus, the prohibited cross-examination would have attacked the crucial witness in the case concerning the crucial, indeed the only, issue in the case -- the identification of Harper as the robber -- an issue on which there was but weak corroboration for the witness.

In addition, of course, the state's case was "far from overwhelming." Olden v. Kentucky, 109 S. Ct. 480, 484 (1988). Small's identification had been made on the basis of a thirty-second observation at dusk of a black man wearing black clothing, sunglasses, and a black hat pulled down over his hair. The lack of a substantial opportunity to observe the criminal might alone have been grounds for finding reasonable doubts of Harper's guilt. In addition, however, when Lester was by chance presented with a sterling opportunity (untainted by any police identification procedures) to identify Harper as the man who robbed Small, he failed even to suspect that Harper was the man. His explanation, that Harper "looked different" than the robber, is perhaps the best evidence that Harper was indeed innocent of this crime.

The weakness of the prosecution's case is underlined by the hung jury at Harper's first trial. Not only was the jury at that trial divided in its views, but it was divided eleven to one in favor of acquitting Harper. Pet. App. at 10a. The real doubts of real jurors who heard the case are a significant factor in showing that a confrontation error was not harmless. Cf. Olden v. Kentucky, 109 S. Ct. at 482, 484 (inconsistent jury verdicts show prosecution's case was "far from overwhelming").

Given the "crucial" nature of Small's testimony on the crucial issue in the case, the weakness of the corroboration for his testimony, Lester's testimony that when he first viewed Harper, Harper "looked different" than the robber, Small's poor opportunity to view the robber, and the overall weakness of the prosecution's case, the error here was plainly not harmless. See Olden v. Kentucky, 109 S. Ct. at 484 (on essentially these factors, confrontation error not harmless).

It does not alter this conclusion that defense counsel stated in his summation that he was "sure" that Small was "very much afraid" at the time of the crime. The trial court explicitly instructed the jury that such arguments were not evidence and that it was the jury's sworn duty to decide the case solely on the evidence admitted during the trial. As the court of appeals noted, counsel's argument did not render

the error harmless, for "as juries are admonished during every trial, counsel's arguments cannot substitute for actual evidence." Pet. App. at 7a.

Petitioner argues, in addition, that the court of appeals erred in failing to apply to the district court's factual findings concerning harmless error the clearly erroneous test of Rule 52(a), Fed. R. Civ. Pro. Petitioner did not make this argument in the court below, and for this reason alone, certiorari should be denied. Moreover, petitioner has not shown that the court of appeals actually "set aside" any "[f]actual finding" made by the district court. Rule 52(a), Fed. R. Civ. Pro. Although petitioner lists a number of what it characterizes as factual findings made by the district court, see Pet. at 14, the court of appeals "set aside" none of these. The court of appeals agreed with the district court, for example, that defense counsel had been allowed to argue to the jury that Small's fear might have affected his identification. It also agreed that the trial court charged the jury to consider "the mental and emotional state of the witness." Pet. App. at 7a. It nowhere disputed the district court's conclusions that Small had seen the robber a moment before the robbery began or that Harper had been allowed other cross-examination of Small. And it did not deny that Lester corroborated Small; indeed it acknowledged that like Small, Lester identified Harper as the rob-

ber. Pet. App. at 7a. Because petitioner failed to raise this issue below and has not shown that the court of appeals "set aside" any factual finding of the district court, this issue does not warrant the grant of a writ of certiorari.[3]

The court of appeals was not required to accord the same significance to these undisputed facts that the district court did, nor was it precluded from considering other facts the district court ignored[4] or reaching a different legal conclusion from that reached by the district court. The ultimate decision whether a constitutional error is harmless is not a question of fact, but "is one of federal law." Rushen v. Spain, 464 U.S. 114, 120 (1983). Accordingly, the

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[3] For these reasons, the court should deny certiorari notwithstanding that this issue is before the Court in McCleskey v. Kemp, No. 89-7024. Petitioner has not shown that he would be entitled to relief even if the outcome of McCleskey were to be favorable to him.

[4] The district court's analysis, upon which petitioner essentially relies, was flawed primarily by its failure to consider the most important factors relevant to harmless error in this case. The district court gave no consideration at all to the fundamental weakness of the prosecution's case, the crucial nature of Small's identification testimony, the vital importance of exploring the bases for Small's identification, Lester's testimony that just three weeks after the crime Harper did not look like the robber, or the prior hung jury in the case. See Delaware v. Van Arsdall, 475 U.S. at 684 (factors to consider include "the importance of the witness' testimony in the prosecution's case ... and, of course, the overall strength of the prosecution's case"); see also Olden v. Kentucky, 109 S. Ct. at 484 (error not harmless because witness's testimony "crucial," corroboration for it was weak, it was contradicted by other witnesses, and state's case was "far from overwhelming").

circuit courts of appeal that have considered the question have quite uniformly determined that the question is entitled to de novo review on appeal. Larson v. Tansy, 911 F.2d 392, 394 (10th Cir. 1990); Hall v. Wainwright, 805 F.2d 945, 947 (11th Cir. 1986), cert. denied, 484 U.S. 905 (1987); McKenzie v. Risley, 842 F.2d 1525, 1531 (9th Cir.) (en banc), cert. denied, 488 U.S. 901 (1988); Holland v. Attorney General, 777 F.2d 150, 156 (3d Cir. 1985); see also Hanrahan v. Greer, 896 F.2d 241, 244 (7th Cir. 1990) (question of correct standard of review open). On the facts found by the district court, the Court of Appeals correctly concluded that the error here was not harmless.

CONCLUSION

The petitition for a writ of certiorari should be denied.

Dated: New York, New York
February 26, 1991

Respectfully submitted,

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February 26, 1991

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

The Honorable William K. Suter
Clerk
Supreme Court of the United States
Supreme Court Building
Washington, DC 20543

Re: KELLEY v. HARPER, 90-1130

Dear Mr. Suter:

Enclosed are ten copies of a brief in opposition to the grant of a writ of certiorari on behalf of respondent Elmer Harper, Jr., an application for leave to proceed in forma pauperis, and a certificate of service.

Three copies of the brief in opposition and one of the application for in forma pauperis relief have been served by first-class mail on ROBERT T. JOHNSON, District Attorney of Bronx County, Counsel of Record for petitioner.

Very truly yours,

DAVID A. LEWIS
Associate Appellate Counsel

DAL/hcs

Encl.

cc: Robert T. Johnson
District Attorney
Bronx County

No. 90-1130

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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WALTER R. KELLY, Superintendent,
Attica Correctional Facility,

Petitioner,

v.

ELMER HARPER, JR.,

Respondent.

CERTIFICATE OF SERVICE

Counsel hereby certifies that three copies of the within brief in opposition and one copy of the application for leave to proceed in forma pauperis have been served by first class mail on Robert T. Johnson, District Attorney, Bronx County, Counsel of Record for petitioner.

Dated: New York, New York
February 26, 1991

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